UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

UNITY CENTER FOR BEHAVIORAL HEALTH, Employer And OREGON NURSES ASSOCIATION, Petitioner	Case No. 19-RC-241339

UNION'S RESPONSE TO EMPLOYER'S REQUEST FOR REVIEW

Thomas K. Doyle
Bennett Hartman, LLP
210 SW Morrison Street, Suite 500
Portland, OR 97204
Telephone: 503-227-4600
Email: Tom@bennetthartman.com
Of Attorneys for Oregon Nurses Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

UNION'S RESPONSE TO EMPLOYER'S REQUEST FOR REVIEW

I. Introduction

On June 19, 2019 an overwhelming majority of the nurses at Unity Center for Behavioral Health ("Unity") voted to be represented by the Oregon Nurses Association (ONA). That election was ordered by the Regional Director for a unit inclusive of all registered nurses at this single facility in accord with the Board's Acute Care rules. The scope of this bargaining unit was found to be presumptively appropriate because nurses at a single facility are presumed to have a community of interest distinct from nurses at other facilities unless integration is so complete that it negates the facility's separate identity. Here, Unity nurses have an entirely separate identity from any other facility – this includes separate location, separate management, distinct working conditions, separate supervision and practically no interchange of employees. The Regional Director applied settled case law in finding that this was a separate facility and that the employer failed to carry its burden to prove that the facility's separate identity had been negated. Therefore, the Regional Director's decision was correct and there is no basis to grant review.

The employer's Request for Review (hereinafter "RFR") asserts that the Regional Director departed from Board precedent by refusing to apply the Acute Care rules in a manner that eliminates the application of the single facility analysis to Acute Care facilities. Remarkably, while arguing that the Regional Director departed from precedent, the employer asks this Board to do the following:

- Reject precedent and create a new doctrine removing acute care facilities from the single facility presumption;

- Reject precedent and have the Board not perform any facility analysis whatsoever; and
- Cede the Board's authority regarding unit determinations to the employer's own voluntary licensing application to a State Agency.

It wages its broadside against decades of Board precedent without citation to any countervailing Board precedent, regulatory authority or case law. More importantly, it seeks to overturn that precedent *sub* nom, without accurately describing what it is seeking from this Board on review. The employer's request for review does not merit consideration, fails to cite any precedent from which the Board allegedly departed and disingenuously argues that the Board does not apply the single facility presumption under the acute care rules.

Similarly, the employer fails to identify any factual issues that the Regional Director got wrong – let alone "substantial" factual issues that could have been outcome determinative.

Finally, the employer asserts that review is necessary for a substantial question of law or policy because the Regional Director ordered an election "contrary" to the Health Care Rule. The unit is exclusively for registered nurses and thus is exactly what the Health Care Rule mandates. 29 CFR 103.30. There is nothing about the Regional Director's decision that is at odds with the Health Care Rule – this Board has a long and clear history of finding that the Health Care Rule applies in concert within a single facility presumption. Those rules set out the appropriate units within a single facility. When there are multiple buildings, the Region is tasked with determining whether different buildings of the business are so functionally integrated that they lose their separate identity. That is exactly what the Region did in this case. The employer is not actually challenging that framework of analysis, the employer is not proposing any alternative, the

employer is simply arguing that the region came to the wrong conclusion. This is not a substantial question of law or policy.

In sum, the employer seeks to obtain review because it seeks to expand the certified unit to include multiple facilities – namely Legacy Emanuel Hospital, Randal Children's Hospital, the Legacy Emanuel Chronic Wound Care Clinic, and a day treatment clinic located in some portion of Medical Office Building 2 (hereinafter "Emanuel"). These additional facilities are all on the Emanuel campus, approximately a mile away from the Unity Center. The Unity nurses are the nurses at a single facility and have their own separate and distinct community of interest.[1] For these reasons, Regional Director's decision was well reasoned, soundly based on Board precedent, and need not be reviewed.

II. Relevant Facts

Unity Center for Behavioral Health was started in 2017 by four regional health systems – Oregon Health Sciences University, Legacy Health Systems, Adventist and Kaiser Permanente. It was created to fill a need in the region for a consolidated mental health treatment facility. Unity opened in late January 2017 and is operated by Legacy. Unity took over what had been known as the Holladay Park Hospital, which had been run in the 1990's by Legacy and whose nurses were represented by the Oregon Nurses Association (ONA). U-30. Unity is located approximately one mile from Legacy Emanuel Medical Center.[2] When Legacy created Unity Center, it registered it as "Unity Center for Behavioral Health – a service of Legacy Emanuel" and its class was identified as a "Hospital Satellite – Psychiatric Services." Er-2. Its principal

---

[1] As part of that separate community of interest, it is relevant that inclusion of "psychiatric hospital" nurses into what would otherwise be an acute care bargaining unit at Emanuel/Randal is likely contrary to the Board rule and precedent.

[2] Unity is registered as a "dba" of Legacy Emanuel Hospital.

place of business with the Oregon Secretary of State was the legal services department of Legacy Health Systems. Er-3.

As part of its opening, the partner facilities closed units and had their nurses apply for Unity positions. Tr. 332: 14-20. This application process generally did not require interviews. Tr. 376: 15-19. Once nurses were assigned units, they went through a Legacy new nurse orientation. However, because they were psychiatric nurses, they were not required to go to the medical nursing portions of the general nurse training. Tr. 404: 4-17. Nurses that transferred from the closed unit at Randall's (Tr. 376: 13-19) went through an identical procedure as nurses from OHSU (Tr. 295-296: 3-16) and Adventist (Tr. 332:5-24).

Unity was started under a relatively new care model called Trauma Informed Care ("TIC"). That care model involved less chemical and physical interventions and use of a milieu treatment environment where patients would interact with staff and other patients more Tr. 306-307: 14-25, 1-19. Even the Psychiatric Emergency Services Unit (PES) was built in a different manner than other emergency departments – patients were in recliners together and there were no separate rooms. Tr. 321: 15-24. As a result, extensive additional training was necessary for Unity nurses – including nurses who had behavioral health background. Tr. 362, 2-9.

After Unity opened, Legacy voluntarily agreed with two unions who currently represented service employees, pharmacists, and pharmacy techs at Emanuel that those employees who transferred over to Unity would continue to be covered under the existing collective bargaining agreement. There was also a new behavioral health technician position that was being used at Unity and Legacy agreed to an *Armour-Globe* election to add those employees into the SEIU bargaining unit. Er. 18.

Unity nurses themselves perform nursing work that is very different than medical nursing. Although they may all do "assessments" – a psychiatric assessment is very different than a traditional head to toe assessment of a medical patient. Moreover, a psychiatric nurse is not called upon to do medical work or use medical equipment – such as IV starting, mixing medications, and other medical nursing. Tr.353: 1-6. Of the approximate 200 Unity nurses, only three have worked at Emanuel since Unity opened. Tr.192-193: 17-2, Er. Ex 32. Emanuel did not provide behavioral health any longer and psychiatric nurses do not have the competencies to work as a nurse in any of the Emanuel or Randall units. Tr. 353:10-21. Similarly, Emanuel medical nurses do not have the training to do psychiatric nursing. Tr.361:1-8, 227: 2-10, 222: 7-9. As a result, there was little to no interchange of employees other than Legacy Resource Pool nurses who are specifically trained to work at Unity.[3]

Unfortunately, soon after opening, Unity began to experience great difficulties with more assaults of staff and injury to patients. Ultimately, the Oregon Health Authority found numerous violations of its rules. Er. Ex. 12. As part of a comprehensive plan of correction, Unity had some nurses from Emanuel come over to witness medication counts. These observers were a temporary phenomenon (August 2018) and these nurses had no patient care responsibilities. Tr. 400: 6-13.[4]

---

[3] The Employer argues that these differences in competencies between psychiatric and medical nursing are no different than differing competencies among different units within the Legacy Emanuel Hospital. This is simply inaccurate – a medical nurse anywhere within the Hospital deals with medical issues to a greater and lesser extent anywhere in the hospital. A psychiatric nurse is not a medical nurse and cannot fill any of positions within the medical facility. Tr. 336-337: 2-8.

[4] The Employer seeks to establish its case by arguing that the fact that the Emanuel state license was at risk if Unity failed to correct its practices establishes that they are a single "Hospital.". However, any shared licensure is purely a function of Legacy's decision to license Unity as a "satellite" hospital with the State. This was a voluntary act the Legacy did for reasons it did not explain. Nevertheless, its own decisions regarding how to license did not result in a "finding" of any sort by CMS or by the Oregon Health Authority. There was no evidence of any review of the relationship between Unity and Legacy other than that a satellite hospital of another hospital need only meet the Oregon regulations that require it be within 30 miles.

As part of the plan of correction, one Unity unit (1-E) was temporarily closed. The nurses who had worked that unit were then used as float nurses among the other Unity units. These nurses became known as Unity Float Pool – although technically a subset of the larger Legacy (not Emanuel) system wide "Resource Nurse Pool" – they worked exclusively at Unity. U-31. Currently, there are approximately six nurses who work out of the Legacy resource pool who are known as the Unity Float. Any other nurses coming from Emanuel is a great rarity – as frequent as once a month, and more often rarer. Tr.400: 6-13.

Unity's management structure has always been housed entirely within Unity, although in the past there may have been some overlap. For instance, the President of Unity was Trent Green, who also served as President of Emanuel. However, in January 2019 the Unity Board of Managers decided that Unity should function even more as a Hospital in the Legacy system. According the Legacy's own description:

- Unity Center needs to function as a hospital within the Legacy Health system and must be organized and led to achieve clinical, financial, and administrative performance results that exceed expectations.
- The organizational structure of Unity Center must provide direct lines of authority and accountability for performance.
- Unity Center should be led by a Hospital President and its operational leaders should report directly to the President, i.e. "Providers, Nursing and Professional Services."U-33.

Although the exclusively Unity only President and Chief Nursing Officer went into effect in January 2019, Unity has always had its own management structure. Hiring decisions were made from the outset by unit managers, discipline decisions were entirely contained in the Unity structure, assistant nurse managers and managers all supervised exclusively within Unity. Tr.

232: 1-29. Legacy Human Resources had a single person responsible for Unity, with an office at Unity, who had no other responsibilities (although that HR person currently has temporary responsibilities at other facilities). There was almost complete control of labor relations within Unity, not at Emanuel.

In addition, Unity has always functioned in the same manner as other Legacy hospitals in another way – it receives centralized support from the Legacy Health Systems – in the same manner that Emanuel does. Unity nurses have Legacy Health Systems number as the payroll payer and W-2 TID Tr. 570-571: 17-22; Legacy provides human resource, payroll, training, a portal for job applications, Legacy hospitalists[5], and other support services. While some services are coordinated through the Emanuel central services division of Legacy, this is merely an administrative division of the services provided by parent corporation. Er 8.

Unity functions separately from Emanuel. Nurses function within their own department and receive patients in the same manner as any other hospital. Tr. 395-397: 17-10. Patients are admitted through the PES unit primarily and onto specific floor units with Unity. Patients are not "transferred" from Emanuel/Randall any more than from the other partner hospitals.[6] Although physical proximity may require emergency medical matters be brought to Emanuel, that is a function of geography rather than functional integration. Ultimately, both internally and to the public, Unity functions and holds itself out as a hospital. As will be argued below, the nurses of Unity have their own community of interest.

---

[5] Unlike other Legacy facilities, Unity's psychiatrists are provided by OHSU – these are a vast majority the providers at Unity. Tr. 46: 1-6.

[6] While for billing purposes, patients who are direct admits from Emanuel are "transferred" this is unrelated to the nursing practice which handles patients as "discharges" from the sending facility – whether Emanuel or OHSU – and an admit into Unity. Tr. 250:15-18, 251-252: 15-10.

III. Argument

A. The Employer Is Asking The Board to Reject Precedent and Rely Upon Licensure to Determine the Scope of Acute Care Bargaining Units

The employer requests review by presenting a circular and largely non-sensical argument. Without overstating or creating a strawman out of the employer's argument, a fair summary of the employer's argument is as follows:

- Emmanuel, Randall (on the Emmanuel Campus) and Unity (a mile away) make up a single "acute care hospital." RFR, p. 2.
- The employer then concludes that: "These buildings are not separate facilities – they are part of a single acute care hospital. Because they are not separate facilities, the so-called "single facility presumption" had no place in this proceeding."

In essence, the employer is arguing that Regional Director should not have determined if they were single facilities or were so integrated as to have no separate identity *because the employer asserts* that they are not separate facilities. The employer provides no analysis for this statement other than to say that they are a not separate facilities.

Instead, the employer baldly asserts that the Regional Director departed from Board precedent by refusing to apply the Acute Care rules in a manner that eliminates the application of the single facility analysis to Acute Care facilities and instead rely upon licensure. The employer can point to no case ever where the Board simply looked to the voluntary licensure of a hospital to determine the scope of the bargaining unit. Remarkably, while arguing that the Regional Director departed from precedent, the employer asks this Board to reject or ignore precedent, create a new doctrine removing acute care facilities from the single facility presumption and to cede the Board's authority regarding unit determinations to the employer's own voluntary

licensing decisions with another Agency, in this case the Oregon Health Authority. It wages its broadside against decades of Board precedent without any citation to any countervailing Board precedent, regulatory authority or case law.

B. The Petitioned for Unit is for a Single Facility

The Regional Director's decision involved a straightforward application of settled Board precedent. The starting point for that analysis is to begin with a determination as to whether the petitioned for unit is for a single facility or multiple facilities. The Region stated:

> The Board has long held that a petitioned-for single-facility unit is presumptively appropriate, unless it has been so effectively merged or is so functionally integrated that it has lost its separate identity. The party opposing the single-facility unit has the heavy burden of rebutting its presumptive appropriateness. To determine whether the single-facility presumption has been rebutted, the Board examines (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between locations; and (5) bargaining history, if any exists. See, e.g., Trane, 339 NLRB 866 (2003); J &L Plate, Inc., 310 NLRB 429 (1993).
> Decision and Direction of Election, p. 6 (hereinafter "DDE").

The Regional Director properly began his analysis with this question as to whether Unity is a single facility. "There is a presumption that a single plant is an appropriate bargaining unit." *Spring City Knitting Co. v. NLRB, 647* F.2d 1011, 1014 (9th Cir.1981). This is true in the acute care hospital setting as well as the healthcare industry at large. *Manor Healthcare Corp.*, 285 NLRB 224 (1987).[7] For purposes of the single facility presumption, an "[e]mployer's building is

[7] In the years since 1991, many cases upholding the appropriateness of all RNs within a single facility have been deemed appropriate by Board adjudication. *See Children's Hospital of San Francisco,* 312 NLRB 920, 926-928 (1993), *Mercy General Health Partners,* 210 L.R.R.M. (BNA) 1131, 2017 WL 6034114 (2017), *Staten Island University Hosp.,* 24 F.3d 450, 146 L.R.R.M. (BNA) 2385, 62 USLW 2748 (1994). In all, there is a long history of finding that nurse only units are appropriate in non-acute care facilities. *South Hills Health Systems Agency,* 330 NLRB 653 (2000). Thus, the petitioned for unit of all RNs within a single facility is appropriate because it fits with the record of appropriate units in non-acute care facilities developed from Board adjudications since *Park Manor.*

a 'single facility'." *Visiting Nurses Association of Central Illinois, 324 NL*RB 55 (1997). To rebut the presumption, the Employer must demonstrate integration so substantial as to negate the separate identity of the single facility. *Heritage Park Health Care Center*, 324 NLRB 447, 451 (1997). It failed to do so here.

The reasoning behind the single facility presumption is best captured by the Board's statement:

> "The employees in a single retail outlet form a homogeneous, identifiable, and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from, the functions of employees in the other outlets, and thus their problems and grievances are peculiarly their own and not necessarily shared with employees in the other outlets." (emphasis added).

Haag Drug Co., 167 NLRB 877, 877-878 (1968).

These observations on the rationale behind single-facility appropriateness in chain retail stores were extended to the healthcare industry by *Manor Healthcare Corp.*, *supra* at page 5.

Undoubtedly, Unity is in a separate building, which is a separate "facility" according to the Board precedent above.

The Region then went on to address the employer's argument that it relies on here as well – that three (or more) facilities -- Emanuel, Randall and Unity – are actually one facility and therefore, the acute care rules require that all nurses across the multi-facility facility be the only appropriate unit.

> As a threshold matter I note that the Employer's primary argument in this case is that Emanuel, Randall, and Unity constitute a single-facility, that facility is an acute care hospital, and accordingly the Board's "Health Care Rule" dictates the only appropriate bargaining unit constitutes "all registered nurses" at Emanuel, Randall, and Unity. 30 C.F.R. § 103.30(a)(1). Under the Employer's theory it does not have the burden to overcome the single-facility presumption because the unit it contends is appropriate is employed at a single "facility," a facility consisting of Emanuel, Randall, and Unity. Petitioner contends that it is Unity that is the single facility, and that a Emanuel-Randall-Unity combination is multi-facility in nature.

> I do not find a basis in the cases cited by the Employer, or Board law more generally, for analyzing the case in the manner the Employer suggests. The Board has repeatedly recognized in the health care context that multiple, physically separate buildings function as one, and the Employer cites to many such examples, including *West Jersey Health System,* 293 NLRB 749, 751 (1989), *Stormont-Vail Healthcare, Inc.,* 340 NLRB 1205 (2003), and *St. Luke's Health System, Inc.,* 340 NLRB 1171, 1172 (2003). **However, in each instance the Board considered the applicability of the single-facility presumption and found, in *West Jersey* and *St. Luke's,* the facilities had become so effectively merged or functionally integrated as to have lost their separate identity, overcoming the presumption. In *Stormont-Vail* the Board considered the Regional Directors application of the presumption and found it misplaced as both parties argued in favor of a bargaining unit at multiple facilities.4 The Board did not, in considering these integrated health care campuses, reclassify the multiple buildings within each a single "facility" in the manner the Employer suggests.**
> DDE, p. 7 (emphasis added).

According to the employer, the Region's analysis is deficient because it "barely pays lip service" to the Board's Health Care Rule. However, as the employer well knows, the application of the Health Care Rule to establish an all nurse bargaining unit in a facility requires the Board to determine the scope of that facility. The Region's analysis to determine if Unity is a facility and then to determine if its separate existence has been erased through integration with the other facilities of Legacy is exactly what this Board requires the Region to do.

C. Licensure Does Not Determine What is "Facility"

As referenced by the Region in its decision, the employer has taken the position that application of the acute care rules requires the proposed unit to be all nurses at the "acute care hospital" as defined by the Hospital's licensure. Therefore, according to employer, the only appropriate bargaining unit is a function of the application of the acute care rules to the "hospital." Thus, under the employer's view, all nurses at all the different facilities that the employer deems to be part of the "hospital" must be combined. This argument flies in the face of decades of Board analysis.

The employer argues that the acute care rule requires that all RNs under the state licensing structure should be included. The Board and the courts have long since rejected this argument:

> The [Acute Care] rule simply does not circumscribe or guide the NLRB's discretion to determine the *facilities* to be included in a unit when health care providers merge (indeed, it neither considered nor requested evidence on this issue); it regulates the different job *categories* to be organized in appropriate units in the health care industry. Nor does the NLRB's finding that UPMC consists of multiple facilities even though it operates under a single license for an acute care hospital contradict its final rule. In that rule, the NLRB defined an acute care hospital to distinguish such institutions from other health care facilities; **it did not delegate its discretion to make multi-facility determinations to state hospital licensing entities**."

Presbyterian University Hosp. v. N.L.R.B., 88 F.3d 1300, 1307-1308 (3rd Cir. 1996)(emphasis added).

Thus, the employer seeks to expand the unit to include nurses at these other facilities by referring to Oregon Health Authority licensure[8] – a factor that is not considered under Board precedent and has been rejected. The Board and courts have rejected the argument that the Acute Care rule says anything about the significance of licensure because the Acute Care rule deals with *job categories* not *numbers* of *facilities*:

> "state licensing terminology referring to the merger of two or more hospitals as a single hospital for licensing purposes, does not prevent the NLRB from considering the actual makeup of various health care entities in order to determine the appropriate number of an employer's facilities to which it must apply the eight bargaining unit categories."

Presbyterian University Hosp. V. N.L.R.B., 88 F.3d 1300, 1308 (3d. Cir. 1996).

Legacy's decision to have Unity Center for Behavioral Health added as a "hospital satellite" under OHA rules is unrelated to the community of interest of the RNs at either facility. A license does not create a community of interests. Moreover, as described below, regardless as to whatever corporate/regulatory structure the employer has chosen to employ, there has been no effect on the community of interest of the employees at issue. There is no evidence that common licensing enables transfers of patient or employees. Common licensure does not change the fact

[8] The Employer even appears to misunderstand that CMS does not do licensure of hospitals. That is a function of a state authority – in this case the Oregon Health Authority. Tr. 624-625: 8-3

that hiring, firing, evaluation, and all day to day management functions are done by Unity managers up to the Unity president. Common licensure does not even alter the fact that Unity is run by four entities, only one of which is Legacy and that Legacy has a minority stake in profits and losses. In other words, formalities such as licensure bear no or little relationship to the community of interest analysis.

Another reason that licensure is irrelevant is that the criteria for licensure vary state by state. The employer points to the fact that its license for Unity from Oregon Health Authority is the under the same umbrella license as Emanuel and Randall. However, that licensure could apply to any "satellite hospital" within thirty-five miles of Emanuel. OAR 333-500-0010(46). Under Oregon Law, there are no requirements that the two facilities be integrated in any manner for Legacy to obtain a satellite licensure. The licensing status is not probative as to any of the community of interest factors.

Yet another reason that common licensure among different facilities does not automatically establish that the differing facilities should be combined as a single facility is because "hospital licensure" in Oregon extends beyond acute care settings. For instance, the Emanuel license includes non-acute care clinics miles away from Emanuel, medical office buildings, and even an outpatient clinic in St. Helens, Oregon. Er-4. If the employer's argument were to hold, non-conforming units would occur immediately.

Rather, the Board requires that the employer establish that the integration of the two facilities is so substantial as to negate the separate identity of the single facility. While licensure may be a minor consideration among numerous other factors that weigh heavily towards Unity clearly having a separate identity, the employer's assertion that common licensure establishes single facility status must be rejected outright.

D. All Relevant Factors Support A Unity Center Nurse Bargaining Unit

To the extent the employer seeks to add employees from other sites, Emanuel, Randall and other clinics in this case, it bears the burden to overcome the single-facility presumption. As the party opposing the single-facility unit, the Employer has the heavy burden of overcoming the presumption. *Trane*, 339 NLRB 866 (2003); *Visiting Nurses Association of Central Illinois, supra*. In order to rebut the presumption, the Employer must demonstrate integration so substantial as to negate the separate identity of the single facility. *Heritage Park Health Care Center*, 324 NLRB 447, 451 (1997)

The Board continues to weigh the "traditional factors" normally utilized in unit determination cases, to determine if the presumption has been overcome. In the healthcare industry, these factors include: (1) geographic proximity of the bargaining unit's members; (2) members' function and skill similarity; (3) similarity of members' employment conditions; (4) administrative centralization; (5) managerial and supervisory control of the unit's members; (6) employee interchange; (7) functional integration of the employer; and (8) bargaining history of the unit's members. *Staten Island University Hospital, 308 NLRB No. 9, Case* 22-RC-10585 (1992). In addition, *Manor Healthcare Corp., supra*, the Board also allowed the party opposing such a unit to do so "by a showing of circumstances that militates against its appropriateness, including an increased risk of work disruption or other adverse consequences." *Id.*

Thus, consideration of these factors overlaps with traditional community of interest factors and each is analyzed below.[10] The region correctly found that each either supports, or is

[10] In agency adjudications, the Board looks to several factors to determine whether a petitioned-for bargaining unit is appropriate: "[1] whether the employees are organized into a separate department; [2] have distinct skills and training; [3] have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; [4] are functionally integrated with the Employer's other employees; [5]have

neutral, as to appropriateness of the petitioned for unit. As described above, because the employer is seeking to include employees from a different site, then it bears the burden for all of the community-of-interest factors.

1. **Geographical proximity.**

Unity is a mile away from Emanuel. U-2, p. 4. Unity is not located on the Emanuel campus and there are numerous non-Legacy owned properties between Emanuel/Randall and Unity. Unity's location is referred to as the Holladay Park Campus because the building itself is former separate hospital that Legacy merged with in the early 1990's. Er-62. Walking between the two hospitals can take approximately 15 minutes. Tr.78 22-23. There are no shared structures, parking areas, or buildings.

*California Pacific Medical Center co*nsidered the separation of the two facilities by over a mile of urban roadways was enough to maintain the single facility presumption. *California Pacific Medical Center v. N.L.R.B., 87 F.3d 304, 310 (9th Cir. 1996).* The geographical distance of 1.2 miles was sufficient to maintain the single facility presumption, and the 9th circuit emphasized the busy nature of the city streets separating the two facilities. *Id.* Furthermore, facilities located merely across the street from each other have been considered sufficiently "segregated" from each other such that a minimal geographical separation did not rebut the single facility presumption. *Hartford Hospital*, 318 NLRB No. 13 (1995).

Hartford Hospital emphasized that the purpose behind the geographical separation factor was the fear that multiple bargaining units in close proximity might create added labor disputes based

---

frequent contact with other employees; [6] interchange with other employees; [7]have distinct terms and conditions of employment; and [8] are separately supervised. (citing *United Operations, Inc.*, supra, 338 NLRB at 123) *PCC Structurals, Inc. and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge W 24.* 365 NLRB No. 160 1,6 (2017).

on jurisdictional issues. *Id.* Because the separation of the psychiatric workers from the unorganized main campus workers satisfied the considerations of the geographical distance factor, the single facility presumption was upheld despite the nominal distance. *Id.*

Similarly, Unity is over a mile from Legacy Emanuel like the campuses involved in *Cal. Pac. Med.,* and Unity is much further from either Emanuel or Randall than the nominal across the street distance in *Hartford.* The purpose for this factor is similarly met because the RNs at Unity are segregated from the RNs at Emanuel and Randall such that certifying a Unity-only bargaining unit would not cause increased labor tensions or increase labor disputes.[11] Like the busy 1.2 miles of San Francisco urban roadways, the distance between Emanuel and Unity is congested, urban roadway. Furthermore, Unity is not located on any major thoroughfare likely used by Randall or Emanuel RNs such that picketing or labor disputes occurring at Unity would spread to Randall or Emanuel. U-2, p. 4. Unity is on the terminating end of two non-arterial roadways, such that visiting Unity would need to be a conscious decision of Legacy Emmanuel or Randall RNs.

One of the few cases to find that a combined surgical facility, support service facility and nursing home facility were in fact a single facility, despite having distinct acute and non-acute care functions is demonstrative of the amount of integration necessary to overcome the single site presumption. In *The Child's Hospital*, 307 NLRB No. 14, the Board found that these three entities were a single entity for bargaining for the following reasons:

1) The three were part of a single physically connected building;
2) Nurses flowed and were assigned among the surgery center and the nursing home;
3) Patients flowed seamlessly between the two facilities;

[11] Notably, the employer produced no evidence on this topic at hearing.

4) The acute and non-acute sides of the building were seamlessly integrated for nearly all purposes.

As the region has stated recently, "because the operations of the acute care hospital and the nursing home were substantial, the entities were housed in a single building and another entity also located in the same building serviced both facilities. These facts are not present in the instant case." PeaceHealth, Decision and Direction of Election, 19-RC-215038. Absent these facilities occupying the same building, the Board will find that the two sites are different facilities and that a petitioned-for unit within each facility will be entitled to the presumption. As discussed below, the remaining factors are all compellingly in favor of the Unity bargaining unit.

2. Control Over Daily Operations and Labor Relations Is at Facility Level.

The Region Correctly found that control was exercised at the facility level – i.e. at Unity. DDE, p. 7.

> The record does indicate significant control over daily operations exists at the facility level. First line supervisors and managers at Unity assign nurses to their work on a given shift, evaluate-those employees, and can discipline nurses. The record also indicates that first level supervisors, charge nurses, and nurses themselves resolve staffing and work assignment issues in a work environment that is fluid and presents unpredictable demands.
>
> In contrast, there is minimal evidence that decisions made at the Emanuel-Randall-Unity level impact daily operations at Unity. The staffing committee addresses how to maintain safe staffing practices, but the committee does not appear to have any actual control on staffing levels. The record indicates staffing levels are a business decision made at the Legacy Health level. Similarly, the committee does not have any control on the assignment of nurses once they are working, as the record indicated these decisions, how the available nursing resources available at any given time will be utilized, are made at the Unity level. Other evidence of Emanuel-Randall-Unity decision making, such as an administrator on-call making decisions that impact on nurses at Unity, appears limited.
>
> DDE, p. 8.

This analysis was entirely supported by the record. An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of

an employer's operation. The Unity nurses are organized into a separate department from other employees at Legacy Emanuel and Randall. It is clear that these Unity nurses are viewed by all as being administratively separate:

- Unity is an entirely different facility.
- Unity has its own President, Chief Nursing Officer, managers, and human resources consultant. U-8, ER-8.
- Each job posting identifies that the position is at specifically Unity. U-16.
- All external communications reflect that Unity is administratively distinct. U-1, 3, 4.

There is no question that the employer's own administrative divisions support the petitioned for Unit because the employer characterizes Unity as a separate department. Tr. 230: 21-22.

The employer takes issue with the role of the staffing committee and argues that the "staffing committee" wields more power than identified by the Region. This is not accurate. Staffing Committees are a creature of the Oregon statute and establish *general* guidelines to ensure that a facility meets minimum requirements set out in Oregon law. They are clinical in nature and have no authority to set actual staffing levels, to determine assignments, or to enforce any guidelines they may create. In fact, each department creates its own staffing plan, which management approves, and which Oregon Health Authority enforces. Ex. 26; OAR 333-510-0110. The fact that this committee simply consolidates plans and has no power to enforce any such plan is not probative as to whether there is any greater centralized control. In fact, there was

no evidence presented on which the employer can argue that the fact that different unit plans are consolidated into a single plan results in any relevant centralized control.[12]

3. **Minimal Employee Interchange.**

The Region also found, based upon the record, that there was minimal employee interchange.

> Here, the record does not establish that a significant portion of the work force works among the facilities which the Employer contends must be in the unit. In this regard, I note that the record evidence relevant to this inquiry is the number or Emanuel and Randall nurses working at Unity or vice-versa. The assignment of resource pool nurses to each facility is not relevant unless the same resource pool nurses were assigned to both Emanuel-Randall and Unity, and they are not. Accordingly, given the very small amount of interchange I do not find this factor weighs in favor of overcoming the single-facility presumption.
>
> DDE, P. 9.

Unity nurses work at Unity only and do not float to Emanuel or Randall, with the exception of 3 employees who crossed over only 23 times cumulatively, in the past year with one employee (Faisal) who was specifically cross trained as a Med-Surg nurse crossing over 19 of those 23 times. Er. 32, Tr. 193: 23-25. Emanuel nurses do not work at Unity Unity has its own specially trained float pool, which is its own distinct subgroup of the Legacy System wide float pool. Notably, this is not an "Emanuel" float pool. (costs Center 400 nurses) Er. 44.

The Region summarized these facts as follows:

> The record demonstrates that, during a one-year period, of the 1450 nurses employed at Emanuel and Randall, 30 nurses worked shifts at Unity, about 2 percent. These nurses worked a total 57 shifts. The record demonstrates that a significant barrier to interchange exists in training and the difference in environments. Nurses at Emanuel and Randall, primarily trained and experienced in a certain type of nursing focused on the physical health of patients, are not able to simply cover a shift in a mental or behavioral health facility. The same is true for the Unity nurses regarding Emanuel and Randall. As a result, the record indicates the 57 shifts

[12] The employer also raises the prospect that there would be conflicting appointments to the staffing committee. This is not the case. The law simply allows the union of represented units to determine the manner of electing members to the committee from those units.

> Emanuel and Randall nurses worked at Unity primarily involved a period when all medication counts at Unity required observers, a function separate from direct care. Of the 200 nurses employed at Unity, only 3 have worked a shift at Emanuel since the opening of Unity in 2017 The record does not indicate what type of work these nurses performed at Emanuel.

DDE, p. 3.

Employee interchange does not support the employer's argument.

4. <u>Distinct Training and Skills</u>.

This factor examines whether the disputed employees can be distinguished from one another on the basis of skills and training. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that disputed employees have similar requirements to obtain employment; that they have similar job descriptions or licensure requirements; that they participate in the same Employer training programs; and/or that they use similar equipment supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penny Company, Inc.*, 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenician*, 308 NLRB 826 (1992). The evidence was that Unity nurses are of an entirely different set of skills and training than Emanuel Nurses:

- Unity RNs receive substantially different training than the Emanuel and Randall nurses. Unity nurses were not trained in the same way that all other general new nurse hires were trained. Unity nurses would leave the training when medical nursing was reviewed since Unity nurses did not do most of what medical nurses at Emanuel and Randall would do. Tr. 411-412: 11-3. Tr. 418: 1-19.
- Unity nurse training is done at Unity and is in addition to two days of general nurse training required for all Legacy Health Care System nurses. The Unity training is beyond what Emanuel and Randall nurses would do and involves learning the Unity-specific care model called Trauma Informed Care. U-14, Tr. 391: 16-22. Unity-

specific training lasting two days is required to work on Unit 6 and more generally at Unity. Tr. 361-362: 23-9.

- Emanuel/Randall nurses do not have the training that is required to work on patient care at Unity. Tr. 357: 11-16.

Unity nurses do not do medical nursing. Unity nurses testified that they would not be allowed to work at Emanuel, did not have the competencies for any positions at Emanuel or Randal. A Unity nurse testified that she tried to become trained in the Emergency Department at Randall, and that after several weeks of training, still was unable to work in that unit. Tr. 353:10-24.

- Nurses at the other facilities use IVs, oxygen tanks, tubular devices, and other medical stabilization tools. Tr. 353: 2-6. Tr. 320: 5-10
- Unity RNs cannot wear or bring in certain items because of the risk that patients will use those devices or things for self-harm. Tr. 322-323: 17-1.
- Unity RNs are trained in de-escalation training meant to help prevent patients from causing harm to others or themselves. Tr. 307: 1-10.
- Unity RNs use skills related to interpersonal issues and administer medicine that is not typically administered at other hospitals. Tr. 336: 7-21. Tr. 326-327: 22-12.

5. **Similarity of Working Conditions.**

The Region correctly found that the fundamental differences in the type of work done did not support the employer's argument that the Unity and Emanuel/Randall facilities were indistinguishable.

As noted, all employees at issue are registered nurses, and as such share similar educational backgrounds and some skills. Similarly, all are employees of Legacy Health system, and have some similarities in their employment based on this. However, in addition to working at geographically separate facilities, nurses at the facilities in dispute work in very different environments using different skills. Emanuel and Randall nurses work in a medical environment where they are focused on, and care for, the physical. health of the patient. This

> role shapes almost all their functions, whether administering medication via an intravenous drip or recording the output of a heart monitor. This contrasts with the behavioral and mental health focus of the Unity nurses. They are much more focused on talking with patients, and their work environment lacks the medical monitoring equipment that is so central to nursing work at Emanuel and Randall.
> DDR, p. 8.

This factor examines whether the disputed employees can be distinguished from one another based on job functions and performed work. The employer argues that the region incorrectly found that there were significant differences between work done by the psychiatric nurses at Unity Center and the medical nurses at the Emanuel and Randall Hospital.

It is true that arguably all of the RNs could be considered as having the same duties or performing the same basic function of patient care. However, Unity RNs deal specifically with psychiatric patients exclusively, which requires specific de-escalation training not taught to other RNs across the two other facilities. Tr. 411-412: 16-3. Moreover, the engagement and treatment of psychiatric patients is entirely different than medical nursing. The day to day job functions of a medical nurse at Emanuel were not reviewed at length by the employer's witnesses, but what was presented clearly evidenced that the taking of vitals, starting IV's, wound care, and IV medication administration are all functions that are done by medical nurses and not done by Unity nurses. Tr. 354-355: 25-11.

The employer argued at hearing that all nurses deal with behavioral health issues and therefore the work done is not "distinct." This characterization is contrary to the record. The purpose of Unity was to establish an entire self-contained milieu environment for treatment of psychiatric patients. This is distinct and unique type of work that is not performed at Emanuel/Randall. Tr. 394: 8-22.

Psychiatric nursing is a distinct type of nursing and was considered differently according to the Board in its rulemaking because RNs are not the exclusive providers of healthcare in

psychiatric hospitals, RNs at psychiatric hospitals in all but one case have been found to constitute a separate appropriate bargaining unit, because their work is closely integrated with the work of other professionals. Collective Bargaining Units in the Health Care Industry, 53 FR 33900-01, 33929-30 (1987). A behavioral health nurse is likely to not have the clinical skills necessary to pick-up a direct patient assignment on a medical floor and vice versa. These nurses do not work together as a crew with the other clinical RNs or that they perform one another's work. Tr. 274-275: 6-1. The specificity and uniqueness of what the Unity RNs do weighs against finding a community of interest between the Unity and Emanuel nurses.

Unity nurses positions require them to work with "milieu" work, which means helping severely mentally ill individuals navigate group activities and manage a myriad of delusions that make group work difficult. Tr. 394: 13-22. Unity RNs do not work to medically stabilize an injured patient in the same way Legacy Emmanuel or Randall RNs would do, nor do Unity RNs have training for the equipment required to medically stabilize an injured patient. Tr. 353: 2-6. Tr. 320: 5-10. Unity RNs are behavioral health workers, so their work is distinct from other employees on site and Legacy Emanuel.

6. Functional Integration.

Functional integration refers to when employees' work constitutes integral elements of an employer's production or business. Thus, for example, functional integration exists when employees in a unit sought by a union work on different phases of the same product or as a group provides a service. Another example of functional integration is when the Employer's work flow involves all employees in a unit sought by a union. Evidence that employees work together on some matters, have frequent contact with one another and perform similar functions is relevant when examining whether functional integration exists, *Transerv Systems*, 311 NLRB 766 (1993).

On the other hand, if functional integration does not result in contact in the unit sought by a union, the existence of functional integration has less weight. Here, Unity nurses are functionally integrated with one another but have no greater function integration with Emanuel nurses than with other area hospital nurses. Nearly all Unity patients come through the Psychiatric Emergency Services (PES) unit and then, if admitted, are put on one of the Unity units depending on diagnosis and acuity. Tr.395-396: 12-4. Charge nurses among the different Unity units meet regularly. Tr. 299: 10-13. Patients are transferred among the different Unity units. Tr. 299: 10-13.

Unlike patient flow within Unity and among Unity nurses, Unity nurses are not functionally integrated with the employer's other nurse employees. They do not come into contact with other nurses or work on different levels of the healthcare equivalent of a production line. Patients who present to the Emanuel Emergency Department are not admitted into Unity by Emanuel nurses. Instead, the patient is directed to Unity. Similarly, pediatric patients who present to Unity PES are not admitted into Randall by Unity nurses. Instead, those pediatric patients are directed to Randall. There, Randall nurses do not admit the patient into Unity. Tr. 292: 1-8. There are rare exceptions when there is a direct admit from Emanuel or one of the other partner hospitals, but those occur rarely and are no different for Emanuel than other facilities.

Similar to admissions, discharges can occur to send the patient to get medical care, because medical care is not provided at Unity. While some patients are discharged in order to go to Legacy Emmanuel or Randall Children's Hospital, there are also significant amounts of patients that are discharged in order to seek physical medical care at OHSU, Providence, or Kaiser. Tr. 291:10. Patients cross over to different hospitals based on their insurance coverage, and not because of internal policies or procedures. Tr. 396: 8-22. There may be more cross over

to Legacy Emmanuel or Randall because of the closer proximity of facilities. For example, if a patient has an emergency wound, it only makes sense for the ambulance service to drive the patient to the nearest emergency department.

Patients do not internally transfer between Emanuel, Randall and Unity for purposes of nursing care. Rather, patients who come from any other facility – Emanuel, Randall, OHSU, or Kaiser are discharged from those hospitals and admitted into Unity. There is no Legacy transport between Emanuel/Randall and Unity. Instead, an ambulance is called if a patient has an urgent medical issue that needs to be seen outside of Unity. Tr. 397: 8-12.

In addition, access to patient charts is functionally the same for nurses when they need to review prior facilities charts. Patients EPIC records are accessible for some transferring facilities – OHSU, Providence, and Legacy. Tr. 304: 1-14. For patients who come from Legacy or partner facilities, including Emanuel, the process is the same – there is doctor to doctor handoff and then nurse to nurse report. Tr. 340: 3-14. Psychiatric providers are OHSU providers, not Legacy. There is no evidence that the workflow from either hospital spills over into the other in significant ways.

The employer will likely point to the fact that Unity operates under the Emanuel/Randall Oregon Health Authority license as evidence of functional integration. As described above, licensure has never been considered a factor in terms of identifying whether there is a community of interest. Moreover, there was no evidence that the licensure has any effect on operations of the hospital such that there could be an effect on community of interest. In other words, if the employer stands on licensure as nearly its sole basis to challenge the petitioned for unit, it must present some evidence that that licensing changes how the workflow of the nurses is

affected. There was no evidence that licensure had any effect on any operation of the employer. Thus, it is irrelevant to this inquiry.

7. The Employees are Separately Supervised.

Another significant community-of-interest factor is whether the employees in dispute are commonly supervised. In examining supervision, most important is the identity of employees' supervisors who have the authority to hire, to fire or to discipline employees (or effectively recommend those actions) or to supervise the day-to-day work of employees, including rating performance, directing and assigning work, scheduling work, providing guidance on a day-to-day basis. *Executive Resources Associates,* supra at 402*; NCR Corporation,* 236 NLRB 215 (1978). Common supervision weighs in favor of placing the employees in dispute in one unit. The fact that two groups of employees are separately supervised weighs in favor of finding against their inclusion in the same unit.

The evidence was that:

- Unity Nurses are separately supervised entirely within the Unity structure. Er-8, Tr.103:19-23. Tr. 256-259: 16-8.
- Unity managers report to the Unity Chief Nursing Officer. *Id.*
- Unity Chief Nursing Officer reports to the Unity President. *Id.*
- Unity has its own President who reports to an Emanuel President and has a dotted line relationship directly with Legacy's Chief Operating Officer.
- Unity's managerial structure has no overlap with Emanuel or Randall – in other words Unity managers do not manage other units.
- Evaluations and Discipline decisions are done by Unity managers and supervisors.
- Hiring and Firing is done by Unity managers.

In sum, the entirely separate supervision of Unity nurses from the employees the employers seek to add into the unit favored rejecting the employer's proposed addition.

8. History of Collective Bargaining.

The Region correctly held that there is no history of collective bargaining for Unity Nurses and there is no history of collective bargaining for Legacy Emanuel/Randall nurses. Thus, this factor cannot be relied on by the employer to expand the petitioned for unit to include other facilities.

Yet, the employer seems to argue that its voluntary agreement to recognize other labor unions for other employees should be taken into consideration. Clearly, consideration of collective bargaining history relates to the employees within the unit at issue. Since neither Unity or Emanuel/Randall nurses have been represented before, this factor does not come into consideration. There is clear Board precedent reflecting that voluntary agreements to the scope of a bargaining unit are not probative. NLRB Outline of Law and Procedure, 12-225. The employer may argue that the fact that it has other collective bargaining agreements that span the two sites indicates centralized control of labor relations. As explained above though, the fact that other employees' terms and conditions may be governed by collective bargaining agreements does not determine if labor relations for nurses have been so affected.

For instance, in upholding the separate unit determination for two department stores, the Board stated, "There is no history of collective bargaining among the Employers' beauty salon employees in the units here involved. But the Union has long had collective-bargaining agreements with Emporium-Capwell covering retail employees in the downtown San Francisco and Stonestown stores." *Carter Hawley Hale Stores*, 273 NLRB No. 89.

"[B]argaining history is not as material when, as here, the disputed employees were previously unrepresented, unless the change in the unit threatens the stability of established bargaining relations. *Wheeler-Van Label Co. v. NLRB*, 408 F.2d 613 (2d Cir. 1969). Realistically, no such disruption is anticipated here; our concern is chiefly with safeguarding the interests of these fourteen employees and, to a lesser extent, the unrepresented office clericals." *Pacific Southwest Airlines v. N.L.R.B.*, 587 F.2d 1032, 1045 (9th Cir. 1978). The employer's reliance on its own stipulated agreements at to the scope of unrelated bargaining units was rightly discarded by the Region. Bargaining history does not support the employer's position in this case.

IV. Conclusion

In conclusion, the Region correctly held that the petitioned for unit is inclusive of all registered nurses at a single facility and thus is presumptively appropriate as a bargaining unit. The employer's Request for Review should be denied. The Region did not depart from precedent, there were no substantial factual issues that were erroneously decided, and there is no substantial question of law or policy that is presented. This is a simple case of a stand-alone facility having a bargaining unit certified of all registered nurses consistently with Board rule and precedent. Review is not warranted and should be denied.

BENNETT, HARTMAN, LLP

S/Thomas K. Doyle

Thomas K. Doyle, OSB No. 972511
doylet@bennetthartman.com
Attorney for Oregon Nurses Association

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on July 18th, 2019 the foregoing UNION'S RESPONSE TO EMPLOYER'S REQUEST FOR REVIEW, was e-filed with the Office of Executive Secretary of the National Labor Relations Board.

The undersigned further certifies that on July 18, 2019, the foregoing UNION'S RESPONSE TO EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION was served on the following parties as indicated below:

VIA E-FILING WITH REGION 19:

Ronald K. Hooks
Regional Director
National Labor Relations Board
Region 19
915 2nd Avenue, Room 2948
Seattle, WA 98174-1006
Of Attorneys for Employer

VIA E-MAIL:

Jacqueline M. Damm, Esq.
Ogletree, Deakins Nash Smoak & Stewart, PC
222 SW Columbia St., Ste. 1500
Portland, OR 97201
Phone: 503-224-4518
Fax: 503-552-2140
Jacqueline.damm@ogetreedeakins.com

BENNETT HARTMAN LLP

By: *s/Thomas K. Doyle*
Of Attorneys for Oregon Nurses Association